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No. 71-1033

In the Supreme Court of the United States

OCTOBER TERM, 1971

GREAT DANE TRAILERS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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Petitioner Company was found by the Board to have violated Section 8(a) (3) and (1) of the National Labor Relations Act (Pet. App. 3a), having discharged employee Hodge, and refused to permit employee Vangiller to withdraw his resignation, because each man had engaged in union activities (A. 13-14, 25-29).[1] The court of appeals sustained the Board's findings and enforced its order (Pet. App. 2a). The sole question presented in the petition is whether the Company had adequate notice of, and opportunity to be heard on, the charge with respect

[1] "A." refers to the appendix to the briefs in the court of appeals.

to Vangiller. The facts relevant to this issue are as follows:

1. The complaint issued by the Board's General Counsel alleged that the Company had "discharged" Vangiller because of his union activities (A. 3–4). However, the proof adduced at the hearing before the Trial Examiner showed that Vangiller had in fact resigned, and, shortly thereafter, had sought unsuccessfully to rescind that resignation. The Trial Examiner, whose finding was sustained by the Board (A. 51–53), found that the Company refused to rescind Vangiller's resignation because of his union activities (A. 25–29).[2]

In these circumstances, the Company was not prejudiced by the fact that the complaint characterized the discrimination against Vangiller as a "discharge" rather than as an "unrescinded resignation." The general nature of Vangiller's termination was well known to the Company, and the only real issue was whether the termination—however described—was discriminatorily motivated. The General Counsel's proof at the hearing made out a *prima facie* case of such discrimination (n. 2, *supra*), and thus placed

[2] Thus, in mid-morning on Friday, November 14, 1968, Vangiller, upset over the broken promises of his supervisors that he would get time off on Saturday to accomplish some personal business, tendered his resignation. However, by mid-afternoon, Vangiller changed his mind and so advised his immediate supervisor, Assistant Superintendent English. English told him that he would have to talk to the personnel office, but not before the shift ended. At that time, Vangiller went immediately to Personnel Manager Egede-Nissen, explained why he had given notice to quit, and requested permission to withdraw his resignation. Egede-Nissen refused to accept the withdrawal because "the union might * * * have a kick if they came in." (A. 20–21, 26–29, 85.)

the Company on ample notice of the nature of the charges against it. The Company failed to sustain its burden of overcoming the General Counsel's proof.

2. *National Labor Relations Board* v. *Johnson*, 322 F. 2d 216 (C.A. 6), certiorari denied, 376 U.S. 951 (Pet. 5–6), on which petitioner places principal reliance, is distinguishable. The complaint there alleged an unlawful refusal to reemploy economic strikers, a claim which is substantially different from the one that the Board sought to add in that case, *i.e.*, whether the strikers were unlawfully discharged. Moreover, there, unlike here, "the discriminatory discharge was an issue unrecognized by the respondent and not one that should have been readily perceived from the progress of the proceedings" (322 F. 2d at 220).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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